IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20010 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHAH BHIKHABHAI CHIMANLAL & 1 - Petitioners
Versus
SHAKARIBEN BABUBHAI PRAJAPATI - Respondent

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Appearance :
MR B.J.SHELAT, SENIOR ADVOCATE WITH MR. UDAYAN P VYAS for the Petitioners.
MRS SANGEETA N. PAHWA FOR M/S THAKKAR ASSOC. for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 26/09/2007

ORAL JUDGMENT

Rule. Learned counsel Mrs.Sangeeta Pahwa waives service of notice of Rule on behalf of the respondent.

This petition has been preferred against the order dated 14th March,2007 below Exh-15 in Civil Misc.Application No.179 of 2006 passed by Learned Principal Senior Civil Judge, Gandhinagar, whereby delay condonation application preferred by the present petitioners (original plaintiffs) of Special Civil Suit No.104 of 1996 (old No.311 of 1992) was not allowed.

2. It appears from the facts of the case that originally the Suit was instituted at Ahmedabad, subsequently, the same was transferred to Gandhinagar and the same was dismissed for default because of the absenteeism of the lawyer and, therefore, restoration application was preferred along with delay condonation application by the present petitioners (original plaintiffs), as a result, there was a delay of 4 years and 140 days in preferring restoration application. As the same has been dismissed by the Trial Court, the petitioners (original plaintiffs) have preferred this petition.

3. Learned counsel for the petitioners (original plaintiffs) have submitted that plaintiffs have instituted two Suits against the present respondents (original defendants). There were two agreement to sell

of the properties bearing Survey Nos.93 and 96/6, situated at Village: Nabhoi, District and Sub-District: Gandhinagar. Thus, two Suits were instituted bearing Special Civil Nos.310 and 311 of 1992 for specific performance on the basis of agreement to sell. Both agreements to sell were of the same date.

4. Learned Senior counsel Mr.B.J.Shelat on behalf of the petitioners submitted that initially, Suits were heard together by Ahmedabad (Rural)Court, same lawyer was engaged by the petitioners (original plaintiffs) at Ahmedabad so that both Suits were conducted together. As the original plaintiffs and original defendants were same but survey number of the lands are different, two Suits were instituted on 13th October,1992. They were continued in Ahmedabad Court upto June,1996. Thereafter, both the Suits were transferred to Gandhinagar Court as new Gandhinagar district was formed. Learned counsel for the petitioners submitted that no Notices were ever received by the petitioners (original plaintiffs). Again in Gandhinagar Court, another lawyer was engaged for both the Suits. Special Civil Suit No.310 of 1992 was given new Suit being Special Civil Suit No.208 of 1995 and Special Civil Suit No.311 of 1992 was given a new Suit being Special Civil Suit No.104 of 1996. Special Civil

Suit No.208 of 1995 and Special Civil Suit No.104 of 1996 were between the same parties. For both the Suits, a lawyer was engaged at Gandhinagar Court and always lawyer was informing to the original plaintiffs that Court has taken a matter on hand bearing Suit No.208 of 1995. As and when Suit No.104 of 1996 will come on board for evidence, he will inform the petitioners (original plaintiffs). Ultimately Suit No.208 of 1995 was partly allowed and in respect of specific performance, compensation was given. Against the said judgment, First Appeal was preferred by the present petitioners bearing First Appeal No.1319 of 2006, which has been admitted on 24th November,2006. There is no reason for the present petitioners to attend one suit and not to attend another suit. Initially, Special Civil Suit Nos.310 and 311 of 1992 were going on simultaneously in Ahmedabad Court. In Gandhinagar Court, one Suit is given Suit No.208 of 1995 and another Suit is given Suit No.104 of 1996. At Ahmedabad Court, one lawyer was engaged for both the Suits. The same was the position at Gandhinagar Court. The Suit No.208 of 1995 was conducted by him and the matter was over.

5. Learned counsel for the petitioners submitted that there was a mistake on the part of the lawyer of the

present petitioners, as, on his docket, he has written new Suit number as 108 of 1996 but in fact, new Suit Number was 104 of 1996. As a consequence thereof, the lawyer could not remain present before the Court at Gandhinagar. The Suit was dismissed for want of prosecution on 10th July,2002. Thereafter also, when the original plaintiffs asked their lawyer about next date of adjournment of the Suit, the lawyer answered that as and when the matter cames for evidence, he will inform the petitioners (original plaintiffs). Ultimately, on 10th November,2006, the lawyer gave an answer that the Suit has already been dismissed for default. Thereafter, immediately, restoration application was preferred with delay condonation application on 27th November,2006. In fact, it is the petitioners (original plaintiffs), who insisted for early hearing of the Suit. Therefore, lawyer has to go to the Court and when he came to know that the Suit was dismissed for default, he, in turn, informed the petitioners (original plaintiffs). Thus, there is no negligence on the part of the present petitioners (original plaintiffs) and there is no reason for the present petitioners not to conduct another Suit for another survey number of the land. Previous suit was already partly decided in favour of the petitioners (original plaintiffs). Delay condonation application was

preferred, wherein all these facts have been narrated. Delay has not been condoned by the Trial Court. Learned counsel for the petitioners has also relied upon the decisions reported in **AIR 1981 SC 1400, 1997(3) GLR 2062, (1998)7 SCC 123, (1999)2 GCD 1290, (2002)3 GLH 226** and has pointed out that delay ought to have been condoned, especially when there is a meritorious matter. It is also contended that there was a mistake of the lawyer and parties should not suffer. On the contrary, the petitioners (original plaintiffs) were very much vigilant for conducting their Suits. Out of two Suits, one was already over in favour of the present petitioners (original plaintiffs). Thus, there is no want of bonafides on the part of the petitioners and, therefore, delay ought to have been condoned by the Trial Court and the Suit ought to have been restored. This aspect of the matter has not been appreciated by the Trial Court.

6. Learned counsel Ms.Sangeeta Pahwa for the respondents (original defendants) submitted that there is a gross negligence on the part of the petitioners (original plaintiffs) and, therefore, delay condonation application has rightly been rejected by the Trial Court. The petitioners have not engaged any lawyer and, hence, no question whatsoever arises for negligence,

bonafide error or mistake of a lawyer. There is no explanation with the present petitioners (original plaintiffs) for delay from the year 2002 to 2006. There is a gross delay of 4 years and 140 days without any explanation. Learned counsel for the respondents also relied upon decisions **AIR 1984 SC 38, 2006(3) GLH 716, (1972)1 SCC 366 and (2005)11 SCC 197** and has pointed out that if there is a negligence on the part of the party, then, the delay ought not to be condoned just upon asking and the order passed by the Trial Court is true, correct and inconsonance with the facts of the case.

7. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, the order dated 14th March,2007 below Exh-15 in Civil Misc.Application No.179 of 2006 passed by Learned Principal Senior Civil Judge, Gandhinagar, deserves to be quashed and set aside, mainly for the following facts and reasons:

(i) It appears from the facts of the case that the present petitioners have instituted two Suits bearing Special Civil No.310 of 1992 and 311 of 1992 for specific performance for two different survey numbers of the land. The plaintiffs and original defendants are same persons in both the Suits but the survey numbers of land are

different and, therefore, two Suits were instituted in the Court at Ahmedabad.

(ii) It also appears from the facts of the case that because of the administrative reasons, the aforesaid two Suits were transferred to Court at Gandhinagar.

(iii) Initially, both the Suits at Ahmedabad were going together i.e. Special Civil Suit Nos.310 of 1992 and 311 of 1992 but at Gandhinagar Court, Special Civil Suit No.310 of 1992 was given new Special Civil Suit No.208 of 1995 and Special Civil Suit No.311 of 1992 was given new Special Civil Suit No.104 of 1996. Here both the Suits were separated and hearing of both the Suits were going on different dates. Special Civil Suit No.208 of 1995 was partly allowed in favour of the present petitioners (original plaintiffs). Compensation was given and First Appeal has also been preferred by the present petitioners (original plaintiffs) before this Court against the order dated 23rd December,2004 passed in Special Civil Suit No.208 of 1995. First Appeal was admitted by this Court vide order dated 24th November,2006. Looking to these facts, it appears that the petitioners are ready and willing to conduct their Suits. There is no reason for the petitioners, who

instituted two Suits to conduct one Suit and not to proceed with another Suit. It ought to have been kept in mind by the Trial Court that nobody is going to the Court just for nothing. They have to go to lawyer's place; lot of documents have to be given to the lawyer for drafting of plaint; every time inquiry has to be made by the parties for their matters; Court fees has to be paid. All these are not done, for, not to conduct the Suit. One Suit is already conducted and it is already over.

(iv) In Ahmedabad Court, a lawyer was engaged for both the Suits bearing Special Civil Suit Nos.310 of 1992 and 311 of 1992. After matters were transferred to the Court at Gandhinagar, another lawyer was engaged for both the Suits. The lawyer has conducted Special Civil Suit No.208 of 1995. It appears that on the docket of lawyer, by mistake Special Civil Suit No.108 of 1996 has been incorporated instead of correct Special Civil Suit No.104 of 1996.

(v) It appears from the facts of the case that in Special Civil Suit No.108 of 1996, the same lawyer had appeared on behalf of the petitioners (original plaintiffs). Lawyer was under mistaken impression and was giving constantly adjournment dates to the present

petitioners. Ultimately Special Civil Suit No.104 of 1996 was dismissed for default on 10th July,2002. In fact, the present petitioners were frequently and periodically asking for adjournment dates. Lawyer replied that as and when matter will come on the board for evidence, he will inform the petitioners but the earlier Suit was partly allowed in favour of the petitioners vide order dated 23rd December,2004, the petitioners insisted for the hearing of the another Suit also. This is how the lawyer must have taken pain to know the next date of hearing and ultimately, he came to know that the Special Civil Suit No.104 of 1996 was dismissed for default. Thus, the petitioners (original plaintiffs) for the first time came to know that Special Civil Suit No.104 of 1996 was dismissed for default. This knowledge came to the petitioners on 10th November,2006 and immediately restoration application with delay condonation application has been preferred on 27th November,2006. From the date of dismissal of Suit, delay is of 4 years and 140 days, otherwise from the date of knowledge, there is no delay at all.

(vi) It also appears that nothing is mentioned in the Rojkam of Special Civil Suit No.104 of 1996 that after transfer of matter from Ahmedabad Court to Gandhinagar

Court, Notice has been issued and has been received by the petitioners (original plaintiffs). The Suits were transferred for administrative reasons.

(vii) It also appears from the facts of the case that delay of 4 years and 140 days ought to have been condoned by the Trial Court because there is no negligence on the part of the petitioners (original plaintiffs). There is no malafide intention on the part of the petitioners. Out of two Suits, one is already over with evidence, etc. The Suit, which is left out was dismissed for default. Both the Suits were between the same plaintiffs and the same defendants. Initially, they were heard together at Ahmedabad Court but in Gandhinagar different numbers were given for different years and date of adjournments were also different. It also appears from the facts of the case that a lawyer was under the belief that the new number given at Gandhinagar was Special Civil Suit No.108 of 1996, whereas in fact, it was Special Civil Suit No.104 of 1996. Coincidentally, in Special Civil Suit No.108 of 1996, the same lawyer was appearing. The lawyer was under the wrong impression that Special Civil Suit No.108 of 1996 (correct Special Civil Suit No.104 of 1996) is not coming on the board for hearing and, therefore, he was constantly giving reply to the

petitioners that as and when the matter comes on board for evidence, he will inform to the petitioners (original plaintiffs).

(viii) Learned counsel for respondents submitted that no lawyer was engaged for Special Civil Suit No.104 of 1996, even there is no vakalatnama for said Suit No.104 of 1996 and there is no negligence of the lawyer but negligence of the original plaintiffs only. This contention is not accepted by this Court mainly for the reason that looking to overall behaviour of the petitioners (original plaintiffs) in two different Suits:-

(a) it appears that the petitioners have always an intention to engage lawyer;

(b) looking to the Suits at Ahmedabad bearing Suit No.310 of 1992 and Suit No.311 of 1992, in both the Suits, lawyer was engaged;

(c) The petitioners (original plaintiffs) are also knowing that the suits between the same plaintiffs and the same defendants but the survey numbers of the land are different and, therefore, common lawyer ought to be

engaged;

(d) This knowledge is vital part for condonation of delay. With the aforesaid knowledge, the present petitioners have engaged common lawyer for their Suits bearing Special Civil Suit Nos.310 of 1992 and 311 of 1992 at Ahmedabad. Thus, so long as mater is in Ahmedabad Court, a common lawyer was engaged and he has attended both the Suits also on behalf of the petitioners (original plaintiffs).

(e) Looking to this approach of the present petitioners, it also appears that after the matter was transferred to Gandhinagar Court on administrative ground, a common lawyer was engaged for two Suits bearing Special Civil Suit Nos.208 of 1995 and Special Civil Suit No.104 of 1996.

(f) It also appears from the facts of the case that the present petitioners have not only shown their zeal to engage lawyer but they have also conducted Special Civil Suit No.208 of 1995, evidence was taken and the judgement was delivered on 23rd December,2004 and the Suit was partly allowed in favour of the present petitioners. Thus, there is no reason for them, not to conduct,

another Suit bearing Special Civil Suit No.104 of 1996 against the very same defendant as stated herein above. All depends upon lawyer and lawyers depend upon their clerks for number, dates, etc. As stated herein above, on the docket of advocate, instead of new Special Civil Suit No.104 of 1996, it was written as Special Civil Suit No.108 of 1996 and, therefore, Suit was not attended by the lawyer. It has been held by Hon'ble Supreme Court in the case of **Rafiq and another v. Munshilal and another reported in AIR 1981 SC 1400,** especially in paras 2 and 3, as under:

> *"2. We have heard Mr.O.P.Rana, learned counsel for the appellant and Mr.A.K.Sanghi, learned counsel for the respondent. The High Court disposed of the appeal preferred by the present appellant in the absence of the learned counsel for the appellant. When the appellant became aware of the fact that his appeal had been disposed of in the absence of his advocate, he moved an application in the High Court to recall the order dismissing his appeal and permit him to participate in the hearing of the appeal. This application was rejected by the High Court on the ground that though the application was prepared and drafted and an affidavit was sworn on 29th October,1980, the same was not presented to the Court till November 12,1980 and that there is no satisfactory explanation for this slackness on the part of the learned advocate who was required to file the application.*
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> *3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of*

the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may be a villager or may belong to a rural area and may have to knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr.A.K.Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr.A.K.Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be

> *restored to its original number in the High Court and be disposed of according to law. If there is a stay of the dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr.A.K.Sanghi." (Emphasis supplied)*

From the aforesaid judgement, it is clear that no party should suffer for inaction on the part of his counsel. Looking to the aforesaid behaviour of the petitioners, they are vigilant enough -

> *(a) to institute Civil Suits for their rights for duties to be performed by the defendant.*
>
> *(b) they are vigilant enough to engage a lawyer at Ahmedabad as the matter is between the same plaintiffs and the defendant.*
>
> *(c) they are enthusiastic to conduct their Suits. One Suit is already over bearing Special Civil Suit No.208 of 1995, which was partly allowed in favour of the petitioners (original plaintiffs).*
>
> *(d) they have also engaged another lawyer at Gandhinagar Court. They were also asking for date of adjournment of Suit. Because of mistake of lawyer, who has given Special Civil Suit No.108 of 1996 but, in fact, as per Court record, it was Special Civil Suit No.104 of 1996.*

In my opinion, the aforesaid behaviour of the

petitioners (original plaintiffs) is sufficient enough to label the present petitioners as not negligent and there is no want of bonafides on their part. For failure, mistake or error on the part of the lawyer, the petitioners (original plaintiffs) ought not to suffer. The consequence is very drastic for the petitioners. It has also been decided by this Court in the case of **Rajendra M. Mavani V. State of Gujarat and another reported in 1997(3) GLR 2062,** especially para 3, as under:

> *"3. The ground given for default of appearance on the part of the learned Advocate for the petitioner before the Tribunal was that he informed the petitioner about the date of hearing about the petitioner did not turn up. The Learned Advocate for the petitioner before the Tribunal did not appear before it only on the ground that the petitioner did not turn up in response to the intimation given to him with respect to the hearing of the revisional application. I think the Learned Advocate was not justified in not appearing before the Tribunal. He ought to have appeared before the Tribunal and should have reported no instructions from the petitioner. It is, however, a settled principle of law that no litigant should be let down on account of default, inaction or omission on the part of his advocate in view of the binding ruling of the Supreme Court in the case of Rafiq & Anr. v. Munshilal & Anr., reported in AIR 1981 SC 1400."* *(Emphasis supplied)*

In view of the aforesaid decision, a litigant should not suffer for mistake on the part of the lawyer. Here, this Court is not in search of fact that whether there was a bonafide error on the part of the lawyer or

not, but this court is concerned with conduct of the petitioners (original plaintiffs). In my opinion, they are not negligent on their part. On the contrary, they are vigilant enough for engaging lawyer. One Suit is already conducted and there is no reason for the petitioners, to appear in one suit and not to appear in another Suit. One Suit is partly allowed in favour of the petitioners (original plaintiffs). The aforesaid aspect of the matter has not been appreciated by the Trial Court. The judgments upon which the respondents are relying are not helpful to the respondent (original defendant), looking to the facts of the present case as stated herein above.

8. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, the order dated 14th March,2007 below Exh-15 in Civil Misc. Application No.179 of 2006 passed by Learned Principal Senior Civil Judge, Gandhinagar is hereby quashed and set aside. Delay in preferring Civil Misc. Application No.179 of 2006 is hereby condoned, with cost of Rs.15,000/-. The cost will be paid by the petitioners (original plaintiffs) to the respondent (original defendant) within a period of 15 days from today. The Trial Court is hereby directed to decide Civil Misc. Application No.179 of 2006 as

expeditiously as possible, practicable and preferably on or before eight weeks from the date of receipt of writ of this Court, on its own merits, without being influenced by the aforesaid observations. Rule made absolute with no order as to costs.

(D.N.PATEL,J)

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